

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-jmp

Adversary Case No. 1-09-01120-jmp

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

### Debtors.

KAIN KIN WON, et al.,

Plaintiffs,

-against-

HSBC USA, INC., et al.,

Defendants.

## United States Bank

One Bowling Green

New York, New York

October 28, 2009

2:16 PM

## B E F O R E :

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

## VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

1 HEARING re Motion Filed by HSBC USA, Inc. to Dismiss the Class  
2 Action Complaint, Abstain or Stay the Adversary Proceeding.

3

4 HEARING re Motion Filed by Lehman Brothers Special Financings  
5 Inc. to Dismiss the Complaint.

6

7 HEARING re Motion Filed by HSBC Bank (Cayman) Limited, et al.,  
8 to Dismiss, Abstain or Stay the Adversary Proceeding.

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Transcribed by: Pnina Eilberg

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## 1 P R O C E E D I N G S

2 THE COURT: Be seated, please. Good afternoon.

3 MR. SLACK: Good afternoon, Your Honor. Richard Slack  
4 from Weil Gotshal on behalf of the debtors.5 This afternoon we have on the agenda the motion to  
6 dismiss the Wong adversary proceeding that was filed by LBSF.  
7 There's also motions to dismiss filed by the other defendants,  
8 including HSBC, who are separately represented.9 Your Honor, before getting to the motions to dismiss  
10 there are two items I wanted to bring to the Court's attention  
11 as a matter of update. The first, Your Honor, and you may know  
12 this already, is that at the same time that Your Honor was  
13 holding the last omnibus hearing on adversary proceedings the  
14 parties here were arguing a motion to withdraw the reference in  
15 front of Judge Swain. Argument took place, the Judge dictated  
16 a decision on the record and asked us, at the conclusion of the  
17 hearing, to provide a copy of the transcript to Your Honor,  
18 which we did on Friday, October 16th.

19 THE COURT: I received that and I read it.

20 MR. SLACK: The second item, Your Honor, before  
21 turning to the motion to dismiss is that the Court may wish to  
22 know that there have been settlement negotiations, not between  
23 the parties here, Your Honor, but between the regulatory  
24 authorities in Hong Kong and the banks that issue the  
25 minibonds, which is not HSBC but the local banks that issued

1 the minibonds. And under this negotiated settlement the  
2 issuing banks have agreed to buy back the minibonds from the  
3 noteholders at either sixty percent or seventy percent,  
4 depending on certain circumstances. And the minibond holders  
5 agreed, to quote, "Withdrawn, permanently discontinue any  
6 ongoing legal proceedings or mediation arising from or in  
7 connection with the minibonds."

8 The settlement, Your Honor, is an opt in settlement.  
9 So no minibond holder who did not affirmatively choose to  
10 accept it would be a part of it. And settlement packets were  
11 sent out, as I understand it, the week of August 7 through 13  
12 and the minibond holders had sixty days to respond.

13 According to the Hong Kong Monetary Authority press  
14 release from October 23rd, there were approximately 25,000  
15 noteholders who were eligible to receive, and that's a number,  
16 essentially, of the class here who were eligible to receive the  
17 offer. Of that 25,000 approximately 24,300 responded to the  
18 offer. And of the ones that responded, of the 24,300, 99.1  
19 percent of the minibond holders agreed to the settlement. That  
20 means that with respect to the 25,000 potential class members  
21 here, approximately ninety-seven percent have agreed to turn  
22 over their minibonds to these issuing banks and have foregone  
23 litigation on their minibond holdings.

24 One point, Your Honor, that I would make is that we  
25 don't know, we haven't been informed by the plaintiffs, whether

1 the name plaintiffs in this case have responded to that offer  
2 or whether the name plaintiffs have agreed to that offer or  
3 have just not responded. The 99.1 percent, as I understand it  
4 Your Honor, is an interim number in that there are still some  
5 days for some people to be counted. So that number could  
6 actually grow.

7 The last point, Your Honor, is that my understanding  
8 of the people who accepted it, ninety-nine percent of those  
9 have already received their money. So that the settlement has  
10 been effectuated with respect to ninety-nine percent.

11 So what I would like to do, Your Honor, again just for  
12 informational purposes, I have the Hong Kong Monetary Authority  
13 press release that I would like to hand up to Your Honor, if  
14 that's okay?

15 THE COURT: That's fine.

16 (Pause)

17 THE COURT: Thank you.

18 MR. SLACK: And Your Honor, with your permission I'll  
19 move on to the motion to dismiss.

20 THE COURT: I'll give you the permission but let me  
21 just ask you a question.

22 MR. SLACK: Okay.

23 THE COURT: What impact, if any, does the press  
24 release, but more importantly the fact of settlements in Hong  
25 Kong with minibond holders representing a significant percent

1 of the class, have on the present motion to dismiss? Is it  
2 just for my information or is it something that as moving party  
3 you believe I should be taking into consideration in respect of  
4 the matters before me?

5 MR. SLACK: Two things, Your Honor. One, that press  
6 release is not necessary for Your Honor and the arguments I'm  
7 going to be presenting in your ruling today. So it's not a  
8 necessary part of Your Honor's decision in our view.

9 It does have an impact, potentially, on two issues  
10 that Your Honor may decide to reach. The first, Your Honor, is  
11 whether it makes sense to allow the plaintiffs here to replead,  
12 as I'll get to it. We don't think that's appropriate. If Your  
13 Honor was considering whether to allow the plaintiffs to  
14 replead this as a derivative action, then a consideration is  
15 under Rule 23.1 the plaintiffs here would have to be  
16 representative of the noteholders as a whole. And we believe  
17 that it would be a futile act to try to plead that somebody who  
18 represents one, two or three percent of the noteholders because  
19 they wouldn't be representing the interests of ninety-seven  
20 percent of the noteholders as of today, could in fact plead  
21 under 23.1 the requisite typicality in order to allow them to  
22 replead.

23 But Your Honor, again, I don't believe that the  
24 arguments that I'm going to make are going to require you to  
25 reach anything having to do with the press release.

1                   MR. SLOANE: Your Honor, Peter Sloane, Cahill Cahill  
2 Gordon for the defendants other than the Lehman Brothers  
3 entities and other than Bank of New York.

4                   I just wanted to add one thing. For purposes -- I  
5 agree with Mr. Slack entirely with respect to the necessity for  
6 the Court to review that. However, with respect to the  
7 arguments that we are making in addition to the standing and  
8 the jurisdiction arguments, we've made some arguments about  
9 forum non conveniens and that issue of what is going on  
10 elsewhere is highly relevant to that argument.

11                  In fact, annexed to the Song (ph.) affidavit, as Your  
12 Honor I'm sure has seen, are the initial offer made to the Hong  
13 Kong residents plus an update as of a few weeks ago. So it is  
14 relevant if Your Honor feels that you should reach the issue of  
15 forum non or abstention. For our purposes it would be.

16                  THE COURT: Fine. Thank you.

17                  MR. SLACK: May I proceed, Your Honor, to the motions?

18                  THE COURT: Please.

19                  MR. SLACK: Your Honor, the Wong action has been  
20 brought by seven of, as I just said, about 25,000 noteholders  
21 of an entity called Pacific Finance. The notes are sometimes  
22 called minibonds and you've seen that in some of the press  
23 releases and papers.

24                  As I'll discuss in a moment, Pacific Finance, in turn,  
25 entered into a swap agreement with LBSF. And the money from

1 both the noteholders and the LBS swap was put in a trust and a  
2 trustee was appointed. And that trustee, at the minibond  
3 level, was HSBC.

4 I'm going to be addressing, Your Honor, the three  
5 causes of action against LBSF. The first cause of action was a  
6 claim for a declaration that the estate has no interest in the  
7 money at the minibond level or at the Saphire level. As I will  
8 get to that, Your Honor, is just not correct under the  
9 governing documents.

10 The second cause of action, Your Honor, is really a  
11 remedy rather than a separate cause of action, seeking a  
12 preliminary injunction essentially for the same reason, on the  
13 theory that LBSF doesn't have any interest in the funds. They  
14 want a preliminary injunction preventing the money from going  
15 out to LBSF under any circumstances.

16 And third, the noteholders here asked for a  
17 constructive trust. So there are three causes of action but  
18 they basically all ask and are based on the same idea that LBSF  
19 is not entitled to any money, it's not an asset of the estate  
20 as they put it, that's held as collateral right now by the  
21 trustee.

22 We've moved to dismiss on two principle grounds, Your  
23 Honor. First is an issue that Your Honor's probably well aware  
24 of because we've dealt with it both in the motion to stay and  
25 in a separate motion to intervene. And that is a standing

1 argument that these noteholders are creditors and are too  
2 remote in order to bring the claims that they seek.

3 The second, Your Honor, is that under the governing  
4 documents, in fact LBSF has a superior interest to the money  
5 that's sitting in the trust at the minibond level. And since  
6 all money, as I'll explain in a second, flows through the  
7 minibond level, LBSF has an interest in the money that flows  
8 through.

9 Before turning to the merits, Your Honor, it's  
10 important, I think, to understand the structure. And again,  
11 we've done this before and I'll try to do it quickly, but a  
12 couple of preliminaries. In paragraph 45 of their complaint  
13 the plaintiffs allege that the transactions here are virtually  
14 identical in that there were twenty-eight series of minibonds  
15 that were issued and they say that they're virtually identical.  
16 And the question is, why did they plead that? And while I  
17 don't like to try to get into the heads of my adversaries, I do  
18 think the complaint answers that question to some degree. And  
19 that is that they are trying to bring this as a class action  
20 and they have seven plaintiffs. And they don't tell us which  
21 of the minibond series their plaintiffs have bought into.  
22 Instead, what they assert is that these seven, no matter which  
23 minibond series they've bought into, can represent all of them.  
24 And the reason for that is that they're virtually identical.

25 So Your Honor, having plead that they're virtually

1 identical and having a good reason for doing so under a class  
2 action, we have taken that allegation as true and have based  
3 our motion to dismiss on an example transaction, which is the  
4 Series 10 transaction, as you might know from reading our  
5 papers.

6 Your Honor, if you look at the structure chart here --

7 THE COURT: Can I stop you for a second, before we get  
8 to the chart?

9 MR. SLACK: I'm sorry?

10 THE COURT: Let me just stop you for one second --

11 MR. SLACK: Yes.

12 THE COURT: -- before we go to the chart. I recognize  
13 that there has been a pleading that the twenty-eight series of  
14 minibond transactions are substantially identical and Series 10  
15 is identified as a representative transaction. As a matter of  
16 fact, is this structure identical in each of the twenty-eight  
17 series or are there differences?

18 MR. SLACK: There are certain differences in the  
19 documentation but the structure that is set forth in this chart  
20 is going to be substantially similar in each of the  
21 transactions. In other words, both -- all of them have Pacific  
22 Finance issuing notes. All of them have Pacific Finance as the  
23 swap counterparty. All of them have Pacific Finance taking as  
24 collateral the Saphire notes.

25 There are some differences in some of the terms of the

1 documents but the structure here of the transaction is, in fact  
2 as I understand it, substantially similar.

3 THE COURT: Okay. And do all the transactions involve  
4 the Saphire notes?

5 MR. SLACK: Yes. All of the transactions, again as  
6 we'll get to it, the minibond level the collateral, as I  
7 understand it, is for each of the Pacific Finance transaction  
8 the Saphire notes.

9 THE COURT: Okay.

10 MR. SLACK: And if I'm wrong somebody -- one of the  
11 people smarter in the courtroom will write me a note and I'll  
12 tell you.

13 THE COURT: Fine. I'll be looking for that note.

14 MR. SLOANE: I'll talk about the note, Judge.

15 MR. SLACK: Your Honor, so the way this works, and I  
16 actually went through a good part of what I was going to with  
17 the transaction, is that Pacific Finance is an issuer and  
18 issued notes to the minibond holders. So the noteholders here,  
19 the plaintiffs here, are creditors of Pacific Finance. That is  
20 their relationship with Pacific Finance.

21 In this transaction Pacific Finance entered into a  
22 swap agreement with LBSF. There is no privity. There is no  
23 contractual privity with the noteholders. There's no  
24 relationship between LBSF and the noteholders. LBSF sole  
25 relationship here is with Pacific Finance where it entered the

1 swap.

2 Now, what Pacific Finance did is they got the money  
3 from the noteholders and they bought notes, which is the  
4 collateral, for both the notes and the swap. And that  
5 collateral is held by the trustee which is HSBC. And that is  
6 essentially what we'll call the minibond level of the  
7 transaction.

8 Now the reason there's two levels is that the notes  
9 that they have for the minibond, that Pacific Finance bought  
10 with the -- the collateral that Pacific Finance bought with the  
11 money from the notes came from Saphire Finance PLC. So the  
12 relationship between Saphire Finance PLC and Pacific Finance is  
13 as a creditor. And Saphire had a relationship with LBSF and  
14 with the money that they got from Pacific Finance they bought  
15 notes issued by a different German company. And those notes  
16 are held by Bank of New York as the Trustee on the Saphire  
17 level.

18 The important thing here is that the minibond  
19 noteholders, on the Saphire level, are just simply creditors of  
20 a creditor of the issuer of the notes and the counterparty  
21 LBSF.

22 Your Honor, the standing issue with respect to the  
23 noteholders I think is a very simple one and one that I think  
24 we can deal with, at least in its basic form, very simply. I'd  
25 like to put up Section 1.4 of the Principal Trust Deed of

1 Series 10.

2 So again, there's a relationship between, as we looked  
3 at, LBSF and the issuer Pacific Finance. There's a trustee and  
4 a trust deed for the collateral. The plaintiff's plead that  
5 the principal trust deed, the supplemental trust deed and the  
6 prospectus are the governing documents. And the principal  
7 trust deed, at page 3, section 1.4, states, as you see on  
8 there, "A person who is not a party to the principal trust deed  
9 has no right under the contracts, Rights of Third Parties Act  
10 1999, to enforce any term of this agreement except and to the  
11 extent, if any, that this principal trust deed expressly  
12 provides for such act to apply to any of its terms."

13 Your Honor, the principal trust deed was then  
14 supplemented once for each series. So even though what we're  
15 going to be talking about is the tenth supplemental trust deed,  
16 what that means is that this is the tenth series, each series  
17 got one supplement. So in the supplement that applies to the  
18 series that we're talking about here though, you'll find this  
19 in all of the series.

20 Section 6.2 at page 3 of the supplemental trust deed  
21 has a very similar statement. That "A person who is not a  
22 party to the tenth supplemental trust deed has no right under  
23 the contracts," again, "Rights of Third Parties Act 1999, to  
24 enforce any term of this tenth supplemental trust deed."

25 Under the plain terms of both the principal trust deed

1 and the supplemental trust deed the noteholders or any third  
2 party has no right to act with respect to the contracts that  
3 we're talking about here. The person who can act, Your Honor,  
4 is the trustee under the trust agreement. And there are many  
5 provisions throughout the principal trust deed that allow the  
6 trustee to take actions on behalf of noteholders and on behalf  
7 of the collateral.

8           But what's important is that there is no provision in  
9 the supplemental trust deed, none whatsoever, that allows the  
10 plaintiffs to bring an action, the noteholders, the creditors,  
11 to bring an action with respect to the contractual rights, the  
12 governing documents, under the trust deed or the swap.

13           Now Your Honor, that should, in our view, end this.  
14 That's as simple as the argument is on standing. The -- you  
15 have a creditor who's trying to assert the rights of  
16 essentially its issuer. And the documents themselves say that  
17 these creditors have no rights under the documents.

18           Now there's a lot of discussion, Your Honor, in the  
19 briefs, principally by the plaintiffs, saying that  
20 notwithstanding these expressed provisions that they should be  
21 allowed to maintain an action as a derivative action.  
22 Essentially saying that where, in their view, the trustee  
23 doesn't act appropriately that they can bring a derivative  
24 claim. And as a matter of U.K. law bring that derivative claim  
25 on behalf of the trust instead of the trustee.

1                   First point on that, Your Honor, is you don't have to  
2 get there. This complaint was not brought as a derivative  
3 claim. It was brought as a direct claim as a class action,  
4 those are direct claims. And there are very particular and  
5 special procedural rules that a plaintiff must comply with in  
6 order to bring a derivative action. So even though we agree  
7 that U.K. law would tell you when you can bring a derivative  
8 action, Federal Rule of Civil Procedure 23.1 tells you what the  
9 procedures are for bringing that action. And none of those  
10 procedures, which are not technicalities, have been met here.  
11 Just for example, Your Honor, if you are bringing a derivative  
12 claim the complaint must be verified. That means that one of  
13 the plaintiffs would have to issue a verification of the facts  
14 in the complaint, all of the facts, and ultimately make himself  
15 or herself available for deposition on that verification.

16                   The complaint has certain -- there are certain  
17 requirements that a complaint, certain elements, be pleaded  
18 with particularity such as the reasons that they could not get  
19 the trustee to act and what efforts they took to get the  
20 action. And the third point, and this may be the most  
21 important given the conversations we've had today already, is  
22 that the plaintiffs would have to show that they could fairly  
23 and adequately represent the interests of the other  
24 noteholders.

25                   Your Honor, we believe this would ultimately be

1       extraordinarily challenging, given that ninety-seven percent of  
2       the noteholders here are not similarly situated and have  
3       accepted a settlement where they've given up their notes.

4           To the extent there's any question as to whether 23.1  
5       applies here, I would tell the Court that 23.1 doesn't speak  
6       directly in terms of trust but the case law has applied 23.1 to  
7       trusts. And in particular, Your Honor, the Eighth Circuit, as  
8       an example, in the International Association of Firefighters  
9       Local 2665 vs. The City of Clayton, held specifically that a  
10      beneficiary to a trust could only "Bring this suit as a  
11      derivative action that meets the requirements of Federal Rule  
12      of Civil Procedure 23.1." This ruling was echoed in a case by  
13      the Southern District which is the Dallas Cowboys Football Club  
14      vs. The National Football League Trust and that's at 1996  
15      Westlaw, 601-705 from 1996.

16           The other point, Your Honor, that the plaintiffs have  
17       made here is that somehow they should be allowed to replead  
18       this as a derivative action because they've shown what are  
19       called special circumstances. And Your Honor, we, again, we  
20       believe that that's going to be a futile act but I want to make  
21       a point before I get there.

22           The claims that are brought today are brought in their  
23       individual capacity. And those claims can be dismissed and  
24       should be dismissed with prejudice. Whether or not the  
25       plaintiffs bring a separate derivative action, which would then

1 have to comply with 23.1 and allow Your Honor to decide whether  
2 there's typicality and they adequately represent and whether  
3 there are special circumstances. That is something that is  
4 truly not before Your Honor today.

5 Your Honor could, and we think it would be  
6 appropriate, to rule that it would be futile. And why would it  
7 be futile? Because, Your Honor, the cases that they cite, that  
8 the plaintiffs cite, to establish special circumstances, they  
9 do not raise in their complaint and they do not arise to the  
10 level of special circumstances. They've raised two issues in  
11 both their affidavits as well as their brief. The first is is  
12 that the trustee has supposedly failed to act in -- essentially  
13 claiming the collateral at the minibond level for itself. The  
14 second is the trustee is supposedly conflicted, that HSBC is  
15 somehow conflicted.

16 Going to the first one, Your Honor, the plaintiffs  
17 cite no authority that seven of 25,000 beneficiaries because a  
18 trustee isn't doing what they want them to do, those seven  
19 beneficiaries can somehow bring a claim on behalf of the trust  
20 and act instead of the trustee. There's absolutely no  
21 authority for that and the reason is that it would cause chaos  
22 in the law. You could have these seven bringing a claim here.  
23 You could have another seven bringing a claim in Hong Kong.  
24 You could have another seven bringing a claim somewhere else  
25 against different parties. And the case law supports that,

1 Your Honor. The one case the plaintiffs attempt to cite for  
2 the point is an 1886 case out of the U.K. It's the Meldrum  
3 (ph.) case. It's cited by their expert. And what that case  
4 says is exactly contrary, actually, to the point that the  
5 plaintiffs are making here.

6 The English court stated in that case that "It's quite  
7 settled that a new refusal to sue on the part of a trustee does  
8 not entitle a trust to sue in his own name." And the quote  
9 went on to say, "It would be monstrous to hold that whenever  
10 there is a fund payable to trustees for the purpose of a  
11 distribution amongst a great number of persons, every one of  
12 those persons could file a separate bill in equity merely on  
13 the allegation that the trustees would not sue."

14 And Your Honor, this is particularly problematic here.  
15 Because the act that they're saying that the trustee shouldn't  
16 take, and we're going to get here in just a moment, is that  
17 they say the trustee should have tried to capture from LBSF the  
18 collateral here. And as you'll see, the documents in the  
19 minibond level specifically give LBSF a superior right. So  
20 what the trustee has done here is, in our view, completely  
21 appropriate in not seeking any kind of a lawsuit against LBSF  
22 to capture that collateral.

23 With respect to the second special circumstance,  
24 they've alleged that the trustee is somehow conflicted. And  
25 what they say, Your Honor, is that there's a theory that there

1 are certain affiliates of HSBC that have a claim against a  
2 different debtor, that is LBHI in this case. But that is  
3 completely hypothetical. There's absolutely no allegation in  
4 the complaint that there is any actual conflict. That there's  
5 been a conflict raised, that it's had an effect. They just  
6 raise the fact that some affiliate has some interest in another  
7 debtor in this case.

8 Before I get to the other part of the merits I want to  
9 talk briefly about the standing at the Saphire letter.

10 Can I get the chart?

11 For obvious reasons, Your Honor, standing at the  
12 Saphire level is even more remote than the standing we just  
13 talked about at the minibond level. Because what essentially  
14 they want to do is, in the minibond level they want to usurp  
15 the authority of the trustee, HSBC. When you get to the  
16 Saphire level you have a creditor of a creditor of an issuer.  
17 But the authority they want to usurp here is really two-fold.  
18 They have to usurp first the authority of HSBC which has the  
19 ability to act on behalf of the collateral at this level, who  
20 would then have to essentially be saying that they want to  
21 usurp the authority of Bank of New York.

22 So you would have the minibond noteholders here not  
23 only usurping the authority of one trustee but two trustees,  
24 two separate trustees, and there has been absolutely no  
25 allegation, whatsoever, that there is any issue with respect to

1 BNY. So there's a flaw in both the concept here in the  
2 pleadings, even if you were to get that far and say that a  
3 creditor of a creditor of an issuer should have rights to bring  
4 suit against LBSF. And again, those rights would be at this  
5 level, not even at this level.

6 A couple of points, Your Honor, that they make in  
7 their brief with respect to this. The plaintiffs here say that  
8 you can disregard, essentially, everything that you see in the  
9 trust documents and go directly to article 3. And that article  
10 3 is a panacea that allows them standing notwithstanding the  
11 expressed terms of the trust documents. That's wrong on two  
12 counts.

13 First, Your Honor, the case law is very clear that a  
14 creditor of a party is not permitted to assert the contractual  
15 rights of that party. Now we cite those in our brief. I'm  
16 going to butcher this case because it's got a really awful name  
17 but it's G & R Moojestic Treats Inc. vs. Maggiamoo's  
18 International. And it's 2004 WL 1110423. And that's just an  
19 example of that point.

20 The second argument they make is that somehow bringing  
21 a declaratory judgment instead of a claim for monetary damages  
22 cleanses the standing issue from the documents. And again,  
23 there is no authority for that. They cite U.K. law that they  
24 saw allows them to bring a declaratory judgment action. But  
25 much like 23.1, whether a party can bring a declaratory

1 judgment action is a matter of procedure under U.S. law. And  
2 under U.S. law it's clear that they cannot bring a claim as a  
3 creditor where the documents say that they can't.

4 So Your Honor, I want to -- I've got a couple more  
5 points but the main point I want to talk about is now to deal  
6 with each of the causes of action one at a time and I think  
7 fairly quickly.

8 The plaintiffs here not only have an inferior right,  
9 LBSF has a superior right to the collateral. So if I could --

10 -- If you could put up, Rob, section 6.1.

11 Again, if you look at the principal trust deed, this  
12 is the principal trust deed at section 6.1 at page 11, and this  
13 is the provision that tells you that "The trustee shall,  
14 subject to the provisions of each relevant supplemental trust  
15 deed and the clauses 6.3 and 6.4 apply all monies received by  
16 it, under the provisions of the principal trust deed and the  
17 relevant supplemental trust deed and the relevant security  
18 documents, if any, in connection with the realization or  
19 enforcement of the security constituted thereby in accordance  
20 with the priority specified in the relevant supplemental trust  
21 deed and as such priority is set out in condition 4(b)."

22 And let me tell you what all that means. There are  
23 actually, in the trust deed, there are three types of  
24 priorities that you can have in one of these trust deeds. You  
25 can have a priority that says derivatives counterparty

1 priority, that simply means that the derivative counterparty,  
2 which is LBSF here, has priority over the noteholders. There's  
3 pari passu ranking priority, and that means that they share.  
4 And then there's noteholder priority where the noteholders have  
5 priority.

6 So when you look at the supplemental trust deed and  
7 you go to section 53(b) of the supplemental trust deed, and  
8 that is at page 15 of that supplement, it says that the trustee  
9 shall apply, and I won't read it, Your Honor, but it says the  
10 trustee shall apply the monies, as you can see, in accordance  
11 with derivative counterparty priority. And so 53(b) chooses  
12 the derivative counterparty priority as amongst the three types  
13 of different priorities.

14 And then if you go to section -- which is condition  
15 4(b). If you go to condition 4(b) which is at page 73 of the  
16 principal trust deed, and in 4(b), just so you know, if you  
17 chose another priority there's a different waterfall. But in  
18 the derivative counterparty priority it specifies that (b) the  
19 money flows first to the derivative counterparty. And then in  
20 (c) it flows to the noteholders.

21 And, Your Honor, the other documents that the  
22 plaintiffs like to say is important is the prospectus, which is  
23 attached as Exhibit C to the affidavit, and I may get this  
24 wrong, Sing Heung (ph.). And this is the prospectus that went  
25 to each of the noteholders so it should be no surprise as to

1 what I just said. And it says, "Under the trust deed the  
2 claims of Lehman Brothers Special Financing, Inc. or Lehman  
3 Brothers Finance S.A. as swap counterparty for any amounts due  
4 to it under the swap arrangements, including any termination  
5 payment as compensation for early termination, will be paid  
6 first out of the proceeds of the collateral before the claims  
7 of the noteholders are met." So no surprise that this is the  
8 way the documents work. Everybody was told that right up front  
9 and for the record that's page 18 of the prospectus.

10 So Your Honor, again, the noteholder -- the priority  
11 here, and in terms of LBSF's interest in the collateral, is  
12 expressed in the documents. The only point I want to make, if  
13 we could get back the structure chart --

14 (Pause)

15 MR. SLACK: -- is that regardless of what the  
16 documents say at this level, at the Saphire level, in order for  
17 these noteholders to receive money, it must flow up through the  
18 minibond level. And so the way the documents read, the ones we  
19 just looked at, the principal trust deed at the minibond level  
20 indicates that for all money that flows up to these  
21 noteholders, to these particular plaintiffs, that LBSF gets  
22 their share first and in fact has priority over that  
23 collateral. It doesn't matter what the documents say here.  
24 Let's say, for example, that LBSF doesn't have priority here,  
25 then the money goes to the noteholders, which is Pacific

1 Finance in this case. But the money that's at Pacific Finance,  
2 again, is held by HSBC. LBSF has priority at this level under  
3 the documents that we just saw.

4 Your Honor, the last two claims I think, and I'm going  
5 to be even briefer, are injunctive relief, which is cause two,  
6 and the only point that I'll make in addition to the one that's  
7 made in our papers, is that there is no irreparable harm here.  
8 If, for whatever reason, money is distributed to LBSF and this  
9 Court were ever to find that the money should not have gone to  
10 LBSF, LBSF is sitting on a fairly substantial pot of money that  
11 can be paid out if need be.

12 The third claim is a constructive trust and the only  
13 point I want to make there, again we've briefed this, I think,  
14 fairly extensively, is that where you have an actual trust,  
15 which is what we have here, the law doesn't allow you to impose  
16 a constructive trust over the same money. And we've cited the  
17 cases in our brief with respect to that.

18 So in conclusion, Your Honor, we think there's an easy  
19 and ready path, under the plain terms of the documents. The  
20 plaintiffs here have chosen to bring their claims as direct  
21 claims and under the plain governing document terms they can't  
22 do that. Similarly, they allege that LBSF doesn't have any  
23 right to the collateral. And again, the plain terms of the  
24 documents support that.

25 So it's our view that the claims should be dismissed

1 with prejudice and that the Court doesn't need to address any  
2 of the derivative pleading issues that have been raised by the  
3 plaintiffs.

4 THE COURT: All right. Thank you.

5 MR. SLACK: Thank you.

6 THE COURT: Mr. Sloane is coming.

7 MR. SLOANE: Afternoon, Your Honor. Peter Sloane from  
8 Cahill Gordon for all the defendants other than Lehman Brothers  
9 and other than the Bank of New York.

10 Your Honor, first question I know the Court considers  
11 in any of these proceedings is does it have jurisdiction over  
12 this. And the answer is, the Court does not have jurisdiction  
13 over this because standing, Mr. Slack was talking about it  
14 extensively, is jurisdiction. And the Second Circuit has said  
15 so in the Central States case which is 433 F.2d 181. And the  
16 quote, which I think is worth reading because jurisdiction is  
17 very fundamental is, "An essential and unchanging part of the  
18 case or controversy requirement of Article III. If plaintiffs  
19 lack Article III standing, a Court has no subject matter  
20 jurisdiction to hear their claim because the standing issue  
21 goes to the court subject matter jurisdiction. It can be  
22 raised sua sponte in the event it's been raised by both parties  
23 regardless." So the standing issue is a fundamental issue for  
24 the Court to address.

25 The other point, Your Honor, in terms of the question

1 that was asked earlier about the news article, the Court is  
2 entitled and the Court referenced this in the telephone  
3 conference we had about looking to the four corners of the  
4 pleading. On a motion directed to standing or forum non, the  
5 Court is permitted to look to matters outside the pleading.  
6 It's footnote 9, page 9 of our brief, of our reply brief.

7 So a few preliminary points for the Court, let's face  
8 what's really going on here, Judge, and Mr. Slack has alluded  
9 to it. And it is highly relevant to part of our arguments to  
10 say it and to say it plainly. The plaintiffs were looking for  
11 a hook, a hook to get jurisdiction in the southern district in  
12 a federal court. And a hook was a class action that is not  
13 available anywhere else, not available outside the U.S. nor  
14 contingent fees available outside the U.S.

15 So what the plaintiffs have tried to do is to shoehorn  
16 claims into this Court's bankruptcy jurisdiction recognizing,  
17 we submit, that otherwise there would be no jurisdiction and  
18 there would be no proper forum. Now the reason I think it's  
19 relevant, without suggesting I'm framing accusations at the  
20 plaintiff's counsel, is because forum shopping is a fundamental  
21 issue on a forum non analysis. And if there is evidence of  
22 forum shopping it speaks directly to the forum non question.

23 Judge Swain, in her decision, referenced the question  
24 of the timing of all of the proceedings, the motion to withdraw  
25 the reference, etcetera, and at least alluded to the fact that

1 it appeared there might have been some forum shopping there.  
2 That, Your Honor, was totem pole forum shopping. The first  
3 forum shopping was right here. And as I say, the case law  
4 we've cited makes clear that it is relevant to the question of  
5 the proper forum.

6 Now, I just want to point out a few other things, and  
7 I know Your Honor's read the briefs very carefully so I'm not  
8 going to try to state things that are obvious from the briefs.  
9 But first of all, there is no defendant in this case that is  
10 the trustee. The trustee is another entity called HSBC Bank  
11 U.S.A. N.A. And we told the plaintiffs that before they say in  
12 the briefs well we didn't present them with the proper  
13 stipulation. Look, it's been a long time; they had plenty of  
14 avenues to bring in the proper trustee. But the trustee is not  
15 even a party to this case so that is point number one.

16 Point number two is this question that Mr. Slack  
17 alluded to of the news article about what is going on in Hong  
18 Kong. And as we allege and support in the Song affidavit,  
19 Exhibits A and B and C, not only does the Hong Kong statutory  
20 scheme or regulatory scheme make clear that anyone who agrees  
21 to submit to that scheme gives up rights, but it also says they  
22 give up their notes which is the point Mr. Slack made earlier.

23 In all of this it seemed to me one fundamental  
24 question is, jurisdiction aside we want to turn to forum non  
25 and the analysis there, why would this Court entertain the

1 special burdens and procedural complexities and the delays  
2 associated with a class action, a class action of indirect  
3 claims for relief. I say that, HSBC says that but Your Honor  
4 actually the plaintiffs' counsel themselves said it. Because  
5 in the motion to withdraw the reference, and is docket 56 in  
6 this case, page 18 of their withdrawal brief, they say "While  
7 Federal Rule of Bankruptcy 7023 incorporates Rule 23 of the  
8 Federal Rules, consideration of a class action with members  
9 numbering in the tens of thousands dramatically increases the  
10 burden on the bankruptcy court already balancing the interest  
11 of tens of thousands of other creditors." That's the  
12 plaintiff's -- that's what they said to Judge Swain and we  
13 agree with that.

14 This Court shouldn't be burdened with a class action  
15 and the legal framework by which this Court can dispose of this  
16 case quite simply is both the standing argument at both levels,  
17 and I want to come back to that in a second, jurisdiction  
18 because both -- in the complaint they plead that the first  
19 three counts were core but in the motion to withdraw they  
20 called them related to. In the complaint they plead that the  
21 counts IV to XIII were related to and in their motion to  
22 withdraw they called them, "Solely nonbankruptcy claims  
23 involving issues of contract interpretation." Your Honor, we  
24 agree with that too. That's all they are. They're a fight  
25 between nondebtors.

1                   Now, I wanted to -- I said that I was going to refrain  
2 from passing a note and just mention one thing about the  
3 structure. Mr. Slack is right; the basic structure is the  
4 same. The special purpose vehicle was not always Saphire. It  
5 was -- there were other entities, other names. The basic  
6 structure was the same and what differed, of course, and I say  
7 of course but what differed was that there were -- the  
8 waterfall provisions are slightly different in some of the  
9 series than the others. It doesn't change the basic analysis  
10 at the minibond levels about standing or anything else but they  
11 are slightly different.

12                  And let me just add one other thing, because I know  
13 the Court has struggled with arguments that have been made in  
14 other cases on this question of the waterfall and some have  
15 called it the flip clause, that has absolutely nothing to do  
16 with this case. There is no issue in this case of the flip  
17 clause because the question is do they have standing to even  
18 raise the issue. So the Court need not deal with that issue  
19 here. It's not actually presented here and it's not relevant  
20 or necessary to any of the arguments on standing.

21                  The final point I want to make, Your Honor, and then  
22 I'm going to sit down unless the Court has questions is this  
23 question of forum non which, again, the Court could easily  
24 reach looking at matters outside the pleadings. But it doesn't  
25 really have to because it's clear, by their complaint itself,

1 there's not a single plaintiff that is a resident here.

2 The prospectus says the minibonds are not registered  
3 here. The prospectus says the notes are not available to U.S.  
4 persons. We've argued the tenuous connection in the Gazzini  
5 (ph.) case to jurisdiction over any of the HSBC entities. And  
6 what really sums it up is the Morrison case, Your Honor, where  
7 the Court talked about the fact that we, here, Your Honor is an  
8 American court not the world's court. And the Court said we  
9 cannot and should not expend our resources resolving cases that  
10 do not affect Americans or involve fraud emanating from the  
11 U.S. And that's precisely the situation here and the fact that  
12 ninety-nine point whatever percentage of the class has  
13 participated in a settlement brokered by the Hong Kong  
14 regulatory authorities underscores that dramatically, Your  
15 Honor.

16 We've also argued extensively the jurisdiction, as a  
17 personal jurisdiction issue. I don't think the Court has to  
18 reach that but I think it's clear that under Gazzini the  
19 allegations here don't rise to the level of facts asserted in a  
20 pleading that give rise to a *prima facie* showing of  
21 jurisdiction. And we've also briefed and argued the abstention  
22 issue. Again, I don't think necessary for the Court's  
23 determination on this motion.

24 The Court can easily determine the sufficiency of the  
25 complaint on the question of jurisdiction and that question is

1 the question of standing.

2 Thank you, Your Honor.

3 THE COURT: All right. Thank you. I have a question  
4 that's really for Mr. Slack and it's a question about the  
5 impact of the, I'll call it, the repurchase of the minibonds  
6 under the authority of the Hong Kong Monetary Authority  
7 program, which apparently enables those institutions in Hong  
8 Kong that sold the minibonds in the first instance to reacquire  
9 them at, I gather, sixty percent of face in certain instances  
10 and seventy percent for people who are sixty-five and older.

11 MR. SLACK: That's correct, Your Honor.

12 THE COURT: This may be well beyond the scope of this  
13 argument but it occurs to me that in effect unless everything  
14 is being unwound as a result of those purchases, the banks are  
15 simply becoming the noteholders.

16 MR. SLACK: That would be my understanding, Your  
17 Honor.

18 THE COURT: And if the banks are becoming the  
19 noteholders, the banks presumably are in a position to now look  
20 to HSBC Bank U.S.A. as trustee. And demand or direct or do  
21 whatever it is that noteholders do in respect of their trustee,  
22 is that correct?

23 MR. SLACK: That's exactly my understanding, Your  
24 Honor. In fact I think, and maybe Mr. Sloane can give some  
25 color to this, my understanding of the way this works is that

1 as part of the settlement the banks, the issuing banks, are  
2 providing the trustee with funding and indemnity in order to do  
3 whatever it is that the trustee thinks is appropriate in order  
4 to maximize the value of the collateral.

5 I may have said that slightly differently but --

6 MR. SLOANE: May I respond on that, Your Honor?

7 THE COURT: Mr. Sloane, why don't you respond on that  
8 as well?

9 MR. SLOANE: The banks that are actually subject to  
10 the settlement are called the distributing banks; they're not  
11 the selling banks. The distributing banks, indeed subject to  
12 the terms of all their indemnities and back and forth are going  
13 to step into the shoes of the noteholders and may well decide,  
14 they're all Hong Kong banks as I understand it, that whatever  
15 resolution they seek, whether it's some kind of a lawsuit or  
16 negotiated settlement, is something that they should do.  
17 Indeed the scheme of the whole settlement contemplates that  
18 they willing to and get some portion, that extra ten percent of  
19 the proceeds from the trustee.

20 Now again, I'm not saying they have a right to it  
21 absolutely. I'm not saying we don't have defenses, these are  
22 complicated transactions. But that is, indeed, my  
23 understanding of the way it would work. So that is a matter  
24 that awaits the outcome, whether subject to settlement or  
25 subject to further litigation. But it's not here.

1                   THE COURT: Right. Okay. Thank you.

2                   MR. SLACK: Your Honor, just to echo one thing that  
3                   Mr. Sloane said, because I requested a note and I did get a  
4                   note. And what I was told is very similar to what Mr. Sloane  
5                   said that with respect to the Saphire level there were three  
6                   issues, so not just Saphire but there were two other issues.  
7                   But that -- and that there were different collateral that they  
8                   bought. So in our chart here, for ten, they bought collateral  
9                   from a German bank. But that essentially the structure is the  
10                   same where whether it's Saphire or one of the other issuers  
11                   would be in that spot and would buy collateral from a third  
12                   party, which was all the way at the bottom of the chart that we  
13                   had up here today. But that essentially the structure of the  
14                   transactions that we put there is the same and on the minibond  
15                   level is absolutely the same, Your Honor.

16                   THE COURT: So Pacific Finance is the common element  
17                   in all structures?

18                   MR. SLACK: That's my understanding of the structures  
19                   in this series.

20                   MR. SLOANE: Yes, Your Honor.

21                   THE COURT: Okay. Thank you. Okay. I'll hear from  
22                   counsel for the Wong plaintiffs.

23                   MR. DAVIS: Good afternoon, Your Honor. Jason Davis  
24                   on behalf of the Wong plaintiffs of the Coughlin Stoia firm.

25                   I'm going to be addressing LBSF's arguments and the

1 way I'd like to proceed, if it pleases the Court, is first  
2 address the two key standing arguments that LBSF makes. And  
3 then secondly address both the repurchase and the question  
4 regarding the similarity of the documentation between series.

5 THE COURT: Just so I'm clear on what's happening at  
6 this point, are you limiting your presentation to the LBSF  
7 arguments and will one of your colleagues be dealing with the  
8 HSBC argument?

9 MR. DAVIS: Yes.

10 THE COURT: Or are you dealing with everybody's  
11 arguments?

12 MR. DAVIS: Yes, Your Honor. My colleague, Luke  
13 Brooks, also of the Coughlin Stoia firm, will be responding to  
14 HSBC's arguments.

15 THE COURT: Okay.

16 MR. DAVIS: Thank you. The plaintiffs in this case,  
17 Judge, seek to represent a class of investors in collateralized  
18 bonds called minibonds or notes. They were issued by Pacific  
19 International Finance.

20 The notes defaulted because of Lehman's September 15,  
21 2008 bankruptcy. Now the notes have been in default for over a  
22 year but these notes were collateralized by assets set in its  
23 trust that was supposed to be released under these exact  
24 circumstances. That collateral, the Saphire notes, still  
25 hasn't been released. It's still in limbo.

1                   On November 25, 2008 LBSF sent a letter to the trustee  
2 of the minibonds program, HSBC, and told HSBC to cease and  
3 desist from taking any action to unwind the entire program.  
4 The two reasons were the entire program; the entire 1.6 billion  
5 dollar bond program was subject to the automatic stay. The  
6 second reason was an argument that the provisions, the priority  
7 provisions, I believe in the Saphire bond the assets that's  
8 sitting in trust supporting the noteholders, were unenforceable  
9 as a matter of law.

10                  Now that letter also included on the list the actual  
11 Pacific International Finance notes. So LBSF sent a letter to  
12 HSBC stating that the entire program, subject to the automatic  
13 stay, and both the Pacific International notes and the assets  
14 held in trust by HSBC were effectively frozen. Here we are  
15 today, over a year later, and those assets still have not been  
16 released. And the reason we've come to the Court, Your Honor,  
17 is to break the log jam.

18                  These bonds have not been paid back. While there is a  
19 repurchase, they're still outstanding. All of these questions  
20 as to noteholder priority and to priorities in general are  
21 still outstanding. And I just want to make a point with  
22 respect to the relationships that were up on the chart before.  
23 Now LBSF concedes --

24                  THE COURT: Would it help you to have the chart?

25                  MR. DAVIS: It would. I don't want to take his work

1 product.

2 MR. SLACK: You're welcome, if it would be helpful, to  
3 use the chart.

4 THE COURT: Why don't we share the use of the debtor's  
5 chart?

6 MR. DAVIS: Now if you look -- so this chart is useful  
7 to show the relationships in a predefault environment.

8 THE COURT: Do you accept the chart, by the way, as a  
9 fair depiction of the structure?

10 MR. DAVIS: I'd say it's incomplete and I'll just  
11 point out a couple of issues where I think it's incomplete.

12 So in a predefault environment I think it shows the  
13 relationships reasonably well. The problem, Judge, is we're  
14 not in a predefault environment; we're in a postdefault  
15 environment. And you can see that box, HSBC U.S.A. as trustee.  
16 Well, the trustee actually holds the Saphire notes in trust for  
17 the benefit of the noteholders. And so there aren't really two  
18 levels in a postdefault environment, the levels collapse. And  
19 the question is, who's the rightful owner of the Saphire notes  
20 and how much.

21 THE COURT: I don't understand what you just said  
22 about a collapse as a result of a default. In what respect is  
23 the structure different?

24 MR. DAVIS: The structure -- the focus is different,  
25 Judge, because after Pacific International Finance notes

1 default, then the investors look to the collateral. The focus  
2 isn't on Pacific International Finance because the notes are  
3 limited recourse obligations. And the documents specifically  
4 say that the investors shall have recourse to the mortgaged  
5 property. And the way that the documents define mortgaged  
6 property is reference to the Saphire notes that are sitting in  
7 trust -- that are sitting in trust governed by HSBC for the  
8 benefit of the noteholders under these exact circumstances when  
9 the bonds default.

10 THE COURT: Well I understand that argument but  
11 counsel for LBSF says today, and frankly I heard this argument  
12 some months ago in connection with your motion to intervene in  
13 another adversary proceeding and in connection with request to  
14 stay discovery and I don't know to what extent that hearing led  
15 to the subsequent motion practice leading to attempts to  
16 withdraw the reference, but that doesn't matter for today's  
17 purposes.

18 What I did note, however, and I think I commented to  
19 this effect to you during the course of the argument, was that  
20 the holders of minibonds were remote relative to the dispute  
21 that was then before me. In what respect are they any closer  
22 to the action now?

23 MR. DAVIS: Yes, Your Honor. They're directly related  
24 to the action and I'll just cite a couple of lines from LBSF's  
25 own papers. They say that plaintiffs' claims are directed at

1 collateral underlying a trust to which they are beneficiaries.  
2 As trust beneficiaries in a postdefault context, the assets  
3 that were held in trust waiting, in the unlikely event that  
4 LBSF went bankrupt, all of those rights have sprung up as a  
5 consequence of LBSF's bankruptcy.

6 What's supposed to happen and what would have happened  
7 if HSBC's declaration is to be believed, is the Saphire notes  
8 would have been liquidated and distributed to the noteholders.  
9 Now the reason -- so Judge, from plaintiffs' perspective the  
10 only reason that the bonds haven't been redeemed consistent  
11 with the terms of the trust is because LBSF sent a letter to  
12 the trustee saying cease and desist, take no action, distribute  
13 nothing, don't follow the terms of the trust. And we're not  
14 mere creditors of a creditor, that much is true Judge. But in  
15 a postdefault context the primary relationship that every  
16 single bondholder of a recourse bond looks to are the assets  
17 supporting the bond and their trust beneficiaries, their own  
18 papers, acknowledge that. And even their English law expert,  
19 Judge, if I may they submitted an English law expert's opinion  
20 on this whole subject. And in paragraph 8 of his supplemental  
21 opinion he says "The minibond investors are entitled to  
22 security rights junior to those of LBSF at the retail or  
23 Pacific Finance level." So even their own English law expert  
24 recognizes that plaintiffs have security rights and their  
25 expert goes further when he analyzes security rights with

1 respect to LBSF. What he says is under English law it's  
2 property in the hand of the holder.

3 So in this case, Judge, the plaintiffs are trust  
4 beneficiaries. They hold a security interest in the Saphire  
5 notes which were assets placed in trust by the debtor, Pacific  
6 International Finance, to repay the minibonds under these exact  
7 circumstances.

8 And Judge, we cite case law in the brief, under New  
9 York law, that says under these circumstances plaintiffs who  
10 are trust beneficiaries have standing to seek an adjudication  
11 of the terms of the documentation and the rights and  
12 responsibilities of the parties.

13 What do we have? We have trust beneficiaries, a  
14 trustee, HSBC, and a piece of property. And the question is,  
15 to whom does it belong? Under New York case law, and we cite  
16 Boyd and Kelley (ph.) in support of that concept, the law is  
17 clear in this state that plaintiffs have standing to seek an  
18 adjudication, to come to this Court and ask the Court to break  
19 the log jam. Under English law, which LBSF contends is  
20 applicable in this instance, the outcome is exactly the same.

21 Now unfortunately the Court as dueling experts. LBSF  
22 submitted an expert opinion with their motion, plaintiffs  
23 submitted a response and then their experts submitted an  
24 additional declaration. The experts come out on opposite sides  
25 of the coin. Professor McCormick, who provided his declaration

1 for LBSF, concluded that trust beneficiaries don't have  
2 standing to seek a declaratory relief. And under contracts  
3 law, if they're not parties to the contract they don't have  
4 standing. Now Professor Odata (ph.) who provided an opinion  
5 with plaintiffs' response said that's not true in declaratory  
6 relief action. All that matters is that a plaintiff have  
7 interest that are vitally affected by the subject matter.

8 Now, how does the Court resolve these dueling experts?  
9 I think there's a real world example that all us are very  
10 familiar with and that's the Perpetual matter that's occurring  
11 in London. Now the Perpetual matter in London, Judge, was  
12 brought by Perpetual who was a noteholder. All Perpetual was  
13 was a noteholder in that case and Perpetual sued the trustee  
14 under the bond program. Those bond documents are in the record  
15 with LBSF's summary judgment motion. Perpetual's name appears  
16 nowhere in those documents, nowhere. Perpetual is, for  
17 procedural purposes, for the purposes of figuring out standing,  
18 identically situated to the plaintiffs in this case, Judge,  
19 with the following exception that LBSF will point out.

20 Now in that case Perpetual was seeking an adjudication  
21 of just the trust terms of the documents governing the trust.  
22 So the similar analogy would be, Judge, plaintiffs in this case  
23 seek an adjudication of the documentation governing the trust  
24 relationship between them as trust beneficiaries and HSBC as  
25 the trustee. The difference in this case, Judge, is we're also

1 seeking an adjudication as to the sole asset that's sitting in  
2 trust. And what is a trust, Judge, if it has three elements to  
3 it, a beneficiary, a trustee and an asset. And plaintiffs  
4 submit that the Perpetual decision is a very clear indicator  
5 that a noteholder, though not a party to the contract and  
6 though just a fiduciary under the collateral trust, does indeed  
7 have standing to sue in England.

8 THE COURT: I don't mean to disagree with what you've  
9 just said, and I'm not even sure that the Perpetual litigation  
10 is a fair model for what we're dealing with today. But my  
11 understanding of the Perpetual litigation in London is that  
12 Perpetual, a fund located in Australia that does not do  
13 business, as far as I understand it, in the United States,  
14 brought suit against BNY as corporate trustee in London as  
15 beneficiary and brought a claim against its trustee.

16 In effect, it's what you might have done here if you  
17 had the ability to do it against HSBC Bank U.S.A. as trustee,  
18 and we'll deal with this with your colleague when he comes up  
19 for the HSBC part of the argument. But my understanding is  
20 that the wrong parties were sued. We can talk about that.

21 It's one thing for a trust beneficiary to have a claim  
22 under the trust agreement that might be cognizable under the  
23 trust instrument. It's another thing for you to be where you  
24 are up in the chain as creditors of Pacific Finance with an  
25 indirect interest in an asset which is held in trust to be

1 pursuing that claim in a United States bankruptcy court with  
2 your hook to jurisdiction being claims against LBSF as swap  
3 counterparty and arguing that LBSF should not be asserting  
4 rights with respect to the underlying asset.

5 That's what's going on here and I view that as  
6 materially different in structure and purpose from what  
7 happened in London, which is a very simple in the sense of the  
8 parties' lineup, claim by a beneficiary against a trustee with  
9 respect to the disposition of trust property.

10 MR. DAVIS: If I may respond, Judge.

11 THE COURT: Sure.

12 MR. DAVIS: And if it pleases the Court, may I just  
13 point something out on the demonstrative?

14 THE COURT: Absolutely.

15 MR. DAVIS: Okay. So what -- the most important line  
16 that is missing from this chart, Judge, is a line from HSBC  
17 U.S.A. as trustee to the bondholders. Now, LBSF admits in its  
18 papers that this line should be here. So right here the  
19 analogy to the Perpetual matter, Judge, would be Bank of New  
20 York as trustee of that bond program, Perpetual as the trust  
21 beneficiary of that program. And here HSBC as trustee under  
22 the minibond program and plaintiffs as trust beneficiaries  
23 under the minibond program. That's the analogy, Judge. And  
24 the difference which LBSF will point out is the argument in  
25 that case was focused on the trust documentation. And while

1 that's a critical argument in this case, it's the argument that  
2 LBSF says they have seniority in the waterfall structure and  
3 therefore are entitled to everything. That's a critical  
4 component of this case, Judge. But in addition to that the  
5 question is the disposition of the sole asset that's held in  
6 trust and that's the Saphire note.

7 Now the reason that we needed to name LBSF as a  
8 defendant, Judge, is because in between that line, between HSBC  
9 as trustee and the noteholders as trust beneficiaries in a  
10 postdefault context, LBSF jumped in the middle of that  
11 relationship where the trust assets should have been  
12 liquidated. They should have been liquidated a year ago Judge,  
13 and said hold up, this entire bond program and specifically the  
14 letter that it sent, which is attached as an exhibit to our  
15 document, was sent not to -- was sent to HSBC as trustee of  
16 this minibond program. And so that's the similarity, Judge,  
17 and that's the reason why, under English law, plaintiffs have  
18 the right to seek an adjudication of the bond terms, of the  
19 trust indenture to which they're trust beneficiaries, exactly  
20 as Perpetual is.

21 THE COURT: Perpetual, however, as a foreign entity  
22 sued as a trustee in a foreign court. Here we have foreign  
23 individual holders of the minibonds suing through U.S. counsel  
24 in a United States bankruptcy court. I don't think it's  
25 exactly parallel at all.

1           If you had, in Hong Kong, sued the trustee because you  
2 believe the trustee was not taking appropriate action and you  
3 wanted to break the log jam there, more power to you. What are  
4 you doing here?

5           MR. DAVIS: It's a fair question, Judge. The reason  
6 that we brought this suit here is because LBSF was the one who  
7 has frozen the entire program.

8           Now it's a fair observation, Judge, the documents are  
9 governed by English law, Perpetual is an Australian company,  
10 most of my clients are Hong Kong individuals. And to that  
11 extent they're both foreign and the Hong Kong individuals could  
12 have brought litigation in the United Kingdom, specifically in  
13 London, under English law. What would have happened? They  
14 would have tried to bring the entire case here and would have  
15 accused plaintiffs of violating the automatic stay. We wanted  
16 to be conservative and bring the claims in the one court that  
17 can decide these questions definitively and break the log jam.

18           Now suppose, Judge, we got a decision in Hong Kong  
19 court in English court, what's the next step? More  
20 communication between judges as to which jurisdictional law  
21 should apply? Who should apply it? It was clear, based on the  
22 letter that LBSF sent to HSBC, that the reason that the entire  
23 program was being locked up is because of the U.S. bankruptcy  
24 law.

25           Now, I don't know if an English court can apply that

1 law or not. I confess, I followed some of the filings in that  
2 Perpetual case and I'm not sure exactly how that's going to  
3 work out. What I do know, for a cold, hard fact is that this  
4 Court can apply bankruptcy law and adjudicate this question  
5 definitively.

6 THE COURT: All right. Proceed with your argument.

7 MR. DAVIS: The second principle argument that -- the  
8 second basis for standing, Your Honor, is -- would be  
9 derivative.

10 Now, we requested leave to amend under Rule 15 if the  
11 Court found that plaintiffs didn't have the ability to bring  
12 the suit directly. So the question then would be, under  
13 English law what are the circumstances in which a trust  
14 beneficiary can step into the shoes of the trustee and litigate  
15 a claim that purportedly belongs to the trust.

16 Now in that circumstance, Judge, the situation would  
17 be absolutely identical to what's going on in London. Because  
18 Perpetual, like HSBC, holds -- Perpetual, like HSBC, is a  
19 trustee for other investors. And if we stepped into the shoes  
20 of HSBC as trustee, we would be litigating almost the identical  
21 issues with the one important exception and that is once it's  
22 cleared up, whether the terms of the asset that's held in trust  
23 are enforceable as a matter of English law and as a matter of  
24 U.S. bankruptcy law, the question then becomes how is it  
25 distributed. And that's the next point I want to address, that

1 counsel for LSBF raised.

2 So the primary argument that LSBF makes as to how that  
3 asset is distributed really hinges a hundred percent on the  
4 payment priority provisions in the trust documents. And  
5 basically what they say is the allegations that plaintiffs make  
6 that they're entitled to a hundred percent of the Saphire  
7 notes, save customary and administrative fees, is not a valid  
8 claim because we're higher in the payment priority hierarchy.  
9 But judge, if they only have a one dollar interest in the  
10 trust, they don't have a superior interest when ninety-nine of  
11 the rest of the dollars, assuming par value of the note, goes  
12 to the plaintiffs. So the entire argument that they raise  
13 about payment priority is not valid. And what really needs to  
14 happen, after the presentation of evidence, is a determination  
15 of what, if any, termination payments they're owed.

16 Now the way that it works, and I can point the Court  
17 to the provisions in the supplemental trust deed that govern  
18 this question, is very similar to something the Court is  
19 already considering in the Ballyrack (ph.) matter. The  
20 question under how the termination payments are determined in  
21 the HSBC trust, to which plaintiffs are beneficiary, is really  
22 a question of can you find somebody else to replace LSBF?  
23 That's the question. And in all honesty, Judge, that's going  
24 to require an expert to get down to the last penny. But the  
25 fact of the matter is that LSBF doesn't get to choose -- the

1 fact of the matter is that LBSF does not get a hundred percent  
2 of the distribution of the Saphire notes which, if they're  
3 enforceable under U.S. bankruptcy law, are worth a hundred  
4 cents on the dollar.

5 So the other -- the only other point I wanted to make  
6 with respect to the argument that the payment priority  
7 provisions are a hundred percent outcome determinative is you  
8 really won't hear counsel say we're entitled to a hundred  
9 percent of the assets. That's simply not true. And as alleged  
10 in the complaint we believe plaintiffs are entitled to the  
11 overwhelming majority, if not a hundred percent of that. And  
12 we think it's appropriate to allow that claim to go forward and  
13 test it with discovery.

14 Look at the documents, what do the documents say? If  
15 expert reports need to be brought in, expert reports are  
16 brought in. But the bottom line, Judge, is that the right  
17 result is reached and we're not standing around in limbo for  
18 another year while these bonds are supposed to be paying  
19 interest and are supposed to have returned a hundred percent of  
20 their collateral but have not.

21 THE COURT: Do you know if any of your individual  
22 clients have accepted the offer being sponsored by the Hong  
23 Kong Monetary Authority?

24 MR. DAVIS: Yes, Judge. I believe that three of our  
25 clients either have or will accept a buyback. And for the

1 record, we don't stand in the way of that buyback program. But  
2 four of our clients either cannot or will not, it's my  
3 understanding, as of today. And there's an important factual  
4 clarification I just want to make on this repurchase program.  
5 And that is 8,000 people aren't even eligible for it. The  
6 number that they're describing, this 25,000 individual number,  
7 is the number of people who are eligible for it. And I'm not  
8 going to waste the Court's time explaining all the different  
9 criteria for being eligible or not. But suffice it to say  
10 there are a lot of people who aren't hedge funds who are not in  
11 the 25,000 person number. There are thousands of other people  
12 who would never fall in the definition of a quib (ph.) in the  
13 United States, Judge. And all of those people have received  
14 zero.

15 And the only other point that I wanted to make with  
16 respect to this repurchase program, is that there's a provision  
17 that allows any additional collateral that's recovered under  
18 this program that's held in the HSBC trust, to which our  
19 clients are beneficiaries, any incremental collateral that's  
20 collected over that sixty to seventy percent passes directly  
21 through to all of those people who participated in a program.  
22 And that's an interest that those individuals still hold.

23 For that reason, Judge, it's very important to decide  
24 this question once and for all. I understood the Court's  
25 question with regard -- in this court. I understood the

1 Court's questions with regard to the forum, whether it should  
2 be in Hong Kong, whether it should be in London. But at the  
3 end of the day, Judge, this is the only court that can  
4 definitely break this log jam.

5 THE COURT: You keep calling it a log jam, and I  
6 picked it up at one point, it's hardly a log jam when the Hong  
7 Kong Monetary Authority is providing what's really an  
8 extraordinary remedy for the holders of these minibonds to the  
9 extent they qualify. It's the farthest thing from a log jam.  
10 In fact, it's a creative form of restitution. What happens  
11 after that, I don't know. But why don't you stop calling it a  
12 log jam, you have a litigation claim, period.

13 MR. DAVIS: Yes, Your Honor.

14 THE COURT: And as far as your pursuit of HSBC Bank  
15 affiliates, I don't understand and I realize that you may not  
16 be the right person to answer this; I don't understand why the  
17 right party has not been named and what your purpose is in  
18 pursuing litigation against affiliates that are not the  
19 trustee.

20 MR. DAVIS: Judge, my understanding is, on the Court's  
21 first question the proper party the proper trustee being named,  
22 my understanding, Judge is there was a breakdown in  
23 negotiations. HSBC wanted to extract some concessions that we  
24 weren't able to give and all of the briefing on all of these  
25 questions was already underway.

1                   And I also understand that the general rule is if the  
2 right party is on notice and knows that it's been named but for  
3 an error in the complaint, that's sufficient under the rules.  
4 Now counsel for HSBC, the firm here represents all of these  
5 HSBC entities and it's true that there was a breakdown in the  
6 negotiations over swapping out the right name for the trustee.

7                   But what's also clear is that the right named party  
8 knows that it's been named and has been making very detailed  
9 arguments in its motion to dismiss, both on subject matter  
10 jurisdiction grounds, forum non conveniens grounds and all of  
11 the individuals who are affiliated with creating these bonds,  
12 they're seeking to exclude them on personal jurisdiction  
13 grounds.

14                  THE COURT: Look, I'm not presiding over negotiations  
15 to name the right party. I'm presiding over an argument in  
16 connection with separate motions to dismiss. But I've spent  
17 some time reading papers having to do with arguments made by  
18 HSBC parties that have no business being in this litigation and  
19 I don't understand why the plaintiffs haven't simply dropped  
20 them. Why should I be hearing an argument in respect of an  
21 HSBC entity that isn't the trustee and that has a perfectly  
22 good basis for saying I want out and I shouldn't be paying  
23 counsel fees to get out?

24                  MR. DAVIS: It's a fair question, Judge. And if we  
25 could rewind the clock and these negotiations had occurred

1 before all of these documents had been filed, maybe we would  
2 have done things differently. What we did say is look; we're  
3 not standing on our papers and saying that we named the right  
4 party. We said we've made a mistake. We sought leave to  
5 amend. And what's clear is that all of the substantive  
6 arguments that would be made by the trustee are being made.  
7 Why? Because the trustee knows that it's been named.

8 And as to the other HSBC --

9 THE COURT: But the argument that's being made by the  
10 defendants here piece together as whole in this respect, they  
11 think they've been wrongly sued. And even if you had named the  
12 right trustee, the right trustee would say what are you doing  
13 here in a United States bankruptcy court. That gets into the  
14 forum non conveniens and abstention arguments that I'm not  
15 really addressing right now, I wasn't asked to address right  
16 now.

17 But there's something about this that seems vexatious  
18 to me.

19 MR. DAVIS: I misunderstood your first question,  
20 Judge. So the question is as to the other HSBC entities, why  
21 are they here?

22 THE COURT: Why are they still in the case at all?

23 MR. DAVIS: Yes, Judge. So Pacific International  
24 Finance that issued securities that were tied to synthetic  
25 collateralized debt obligations, that were tied first to

1 default credit swap baskets that were ultimately tied to  
2 hundreds of derivative transactions, transactions that Warren  
3 Buffett had called weapons of mass financial destruction, these  
4 derivative transactions. Pacific International Finance sold  
5 these to retail investors.

6 Now Pacific International Finance is directed by HSBC  
7 employees who are employees of HSBC Cayman. And those two are  
8 defendants, Judge. And Pacific International Finance is a  
9 defendant as well. And the gravamen of the allegations against  
10 this cluster of HSBC entities is number one; you can't sell  
11 credit default swap linked assets to retail investors. And  
12 number two, you said that you would carefully select and  
13 package this deal. And it's very clear, from how things have  
14 panned out, that that wasn't done. Now that was the basis for  
15 bringing them into this litigation.

16 Now it's fair that there are different issues with  
17 respect to LBSF and these HSBC entities. But because the facts  
18 and circumstances appeared interrelated, Judge, it made sense  
19 to bring them all in one forum.

20 THE COURT: Maybe I misunderstood what your complaint  
21 was about. But I never understood that this was a complaint  
22 that was about the inappropriateness of retail investors buying  
23 into credit default swap linked securities sold offshore. I  
24 mean, is that what this case is about?

25 MR. DAVIS: As we said in the complaint --

1                   THE COURT: I thought this case was about the Saphire  
2 notes and the value of those notes and getting to collateral  
3 and a trustee that wasn't acting and in your words a log jam.  
4 It seems to me that you're coloring it with issues that really  
5 aren't before me, aren't you?

6                   MR. DAVIS: Judge, one way to think about it is, from  
7 our client's perspective, they just want to get what Pacific  
8 Finance told them they'd get and that is their principle and  
9 interest back. And so in terms of sequencing the issues that  
10 need to be litigated, it's very possible Your Honor that  
11 plaintiffs could receive a hundred cents on the dollar just  
12 after figuring out what's the value of the Saphire note and how  
13 much of it should be passed through to investors.

14                  But it's also true that these notes were  
15 inappropriately sold to a lot of retail people. And if it's  
16 true, as LBSF seems to suggest, that the noteholders aren't  
17 entitled to anything then we'd want to litigate that question  
18 as well. And so maybe the better way to think about it or one  
19 way to think about it is maybe it makes sense to litigate the  
20 questions just on the terms of the trust documents, what the  
21 value of that asset is held in trust, how it should be  
22 distributed first. Because obviously if plaintiffs receive a  
23 hundred percent of their investment back then there's no need  
24 to litigate the other claims.

25                  THE COURT: Okay. We're way off topic. The topic is

1 why the motions, in your view, should not be granted.  
2 Presumably there are reasons that have to do with standing.  
3 And if there's more that you need to say about that, you  
4 should. If you're mostly done, I should hear from your  
5 colleague.

6 MR. DAVIS: Okay. I would just summarize a few points  
7 because LBSF counsel said that if plaintiffs -- that plaintiffs  
8 -- it would be futile to allow plaintiffs to amend the  
9 complaint to bring the case derivatively if it needed to be  
10 brought derivatively. And our position, Judge, is it doesn't.  
11 And really the question boils down to whether there are special  
12 circumstances in this case that would warrant bringing the case  
13 derivatively.

14 And the points that I would make is HSBC does have a  
15 234 million dollar conflict of interest. It is its other --  
16 there are -- that money owed by the bankruptcy estate to HSBC  
17 affiliates is a substantial conflict and that's one thing that  
18 courts consider. The second point, Judge, is that LBSF, in  
19 their papers, they say that not only are the noteholders trust  
20 beneficiaries of this trust but they too are trust  
21 beneficiaries of the same trust.

22 So going forward how is HSBC trustee to discharge its  
23 fiduciary duties owed to two different groups of trust  
24 beneficiaries who have exactly diametrically opposed economic  
25 claims to the exact same limited fund. It's impossible and

1 that's a special circumstance that a court could consider.

2 The other point that I want to make, Judge, is LBSF's  
3 cease and desist letter really impacts a personal right that  
4 the noteholders have. In the postdefault context the asset's  
5 supposed to be delivered to the investors to make them whole  
6 for their investment. That's how it was supposed to work.  
7 That's not a right that belongs just to HSBC. In a postdefault  
8 environment that should be paid over to the investors.

9 Those are the primary points I just wanted to make.  
10 If the Court wanted some clarification on the first question  
11 regarding how documents were virtually identical and how that  
12 plays into the arguments, I'm happy to entertain that question  
13 as well.

14 THE COURT: I don't think I need to hear more on that.

15 (Pause)

16 MR. BROOKS: Good afternoon, Your Honor. Luke Brooks  
17 from the Coughlin Stoia firm. And before I get started I'll  
18 note that I have a pro hac application pending, I don't think  
19 it's signed yet. So with that --

20 THE COURT: Consider it signed for today's purposes.

21 MR. BROOKS: Thank you, Your Honor.

22 Your Honor, you touched on some of the issues in the  
23 HSBC motion with Mr. Davis. There really are two different  
24 parts to this case. HSBC addresses in its motion, essentially,  
25 the second part of the case which are claims IV through XIII.

1 And those are claims for a breach of contract, breach of  
2 fiduciary duty and other claims that we have related to both  
3 predefault conduct and selling the notes and postdefault  
4 failure to act in getting the collateral back. And Judge,  
5 they've moved so when we're talking about forum non conveniens,  
6 really only those claims are at issue here. Nobody has moved  
7 to, for forum non conveniens for claims I through III.

8 Again, HSBC moved on subject matter jurisdiction on  
9 those claims and Your Honor subject matter jurisdiction is  
10 proper over those claims. They arise from the same facts and  
11 they're related to the bankruptcy. And I know that we have an  
12 issue regarding the named trustee in this case but I will note,  
13 Judge, that the named trustee or the trustee HSBC Bank NA in  
14 the bankruptcy filing filed a proof of claim. And I don't know  
15 if the Court is aware or is focused on that issue but in that  
16 proof of claim they've sought indemnification from any damages  
17 that we get against HSBC, they're seeking indemnification from  
18 LBSF. And so given that new fact that happened in September  
19 after this was fully briefed, I don't think there's really any  
20 question that there is subject matter jurisdiction under  
21 related to for these claims IV through XIII.

22 THE COURT: I think there is a question but I don't  
23 know that we need to address it now. The fact that HSBC, and I  
24 don't know which HSB entity we're talking about, filed a proof  
25 of claim before the bar date and included within that proof of

1 claim some kind of saving provision that included in the claim  
2 some additional potential items that might be associated with  
3 this litigation does not make this litigation related to that  
4 proof of claim nor does it make it related to the bankruptcy  
5 case. All that it does is demonstrate that some lawyer, who  
6 prepared the proof of claim, was thoughtful enough to think  
7 well, couldn't hurt so I'll throw it in. I assume that's how  
8 it happened because it's not a direct claim; it's a contingent  
9 claim in all respects. And I have no idea whether or not there  
10 is or is not any entitlement to indemnity with respect to that  
11 claim and it's not before me at the moment.

12 Furthermore, as to the many thousands, if not tens of  
13 thousands, of claims that have been filed in the Lehman case,  
14 happily none of them are before me, yet. That day will come,  
15 no doubt. That day is not today.

16 So I dispute, for purposes of this record, your  
17 assertion that the fact that HSBC filed a proof of claim  
18 somehow bootstraps you into related to jurisdiction for  
19 purposes of this case. I don't believe it does.

20 MR. BROOKS: And Your Honor, I just want to make  
21 clear, it's not that it bootstraps us in; I wanted to get this  
22 fact out on the record and let the Court know and be aware of  
23 it. Again, from day one we have said that these claims are  
24 interrelated. The claims on IV through XIII are interrelated  
25 with the claims on I through III. And we assert, Judge, that

1 that gives us subject matter jurisdiction to be here in  
2 bankruptcy court to pursue those claims.

3 THE COURT: Okay. Well, it's an intriguing argument.

4 Because generally speaking when there are claims between  
5 nondebtors they try, with all their might, not to be in  
6 bankruptcy court. You seem to be doing the opposite, you're  
7 suggesting that claims against nondebtors should be heard in  
8 bankruptcy court notwithstanding the fact that the causes of  
9 action all relate to events that took place in Hong Kong.

10 MR. BROOKS: Well Your Honor, they don't correlate,  
11 necessarily, to events that took place in Hong Kong. Again,  
12 there are postdefault claims regarding HSBC's failure to pursue  
13 this collateral that relate to events that took place in New  
14 York where LBSF, HSBC bank, the trustee, is a corporate citizen  
15 and where the collateral is located.

16 And so, some of the claims relate to acts in Hong  
17 Kong, marketing of the minibonds and the sale of the minibonds  
18 and Pacific Finance and HSBC's general failure to protect the  
19 interests of these retail investors. Some of the claims arise  
20 from events here. But for -- I'm not sure if the Court is  
21 addressing a subject matter jurisdiction or a forum non  
22 conveniens question, in any event there's no -- if the Court is  
23 interested in forum non conveniens --

24 THE COURT: I think we should focus on the issues and  
25 only the issues that relate to the motions to dismiss that are

1 before me.

2 MR. BROOKS: Both of those are before you, Your Honor.

3 They've moved for dismissal based on subject matter  
4 jurisdiction arguing that claims IV through XIII only are not  
5 related to the bankruptcy and therefore we don't have a  
6 jurisdictional hook.

7 The second argument they've made is forum non  
8 conveniens. If I understand the Court that the Court's  
9 inclination is going to be to dismiss on subject matter  
10 jurisdiction, I won't waste the Court's time discussing forum  
11 non conveniens. I will just remind the Court that those forum  
12 non conveniens arguments only apply to claims IV through XIII.  
13 They have nothing to do with I through III and the issues  
14 regarding the declaratory relief, the constructive trust and  
15 the resulting trust.

16 THE COURT: All right.

17 MR. BROOKS: Thank you.

18 (Pause)

19 THE COURT: Any more?

20 MR. SLACK: I promise to be brief, Your Honor, with a  
21 couple of points. The first point that I think counsel for the  
22 plaintiffs made was that somehow there is a difference in the  
23 documents predefault and postdefault. And I went back, I had a  
24 little time, and looked at the brief that was filed and  
25 listened to the argument and there isn't a single provision of

1 the principle trust deed that's discussed that changes based on  
2 whether you're in a predefault mode or postdefault mode. And  
3 in particular, Your Honor, the provisions that talk about  
4 standing, section 1.4 of the principal trust deed and 6.2 of  
5 the supplemental trust deed, do not change or alter in any way  
6 whether you're in a predefault mode or a postdefault mode.

7 The second point, Your Honor, there was some  
8 discussion that the noteholders are beneficiaries of the trust.  
9 And that is not -- that is not disputed. The provision though  
10 that Professor McCormack cited, you know, that was cited by the  
11 plaintiffs from Professor McCormack's declaration says that  
12 they have a junior interest, the very provision that he read.

13 The second point, Your Honor, is just because you are  
14 a beneficiary of the trust doesn't mean that the trust  
15 documents allow you to sue third parties based on governing  
16 documents. In other words, they are bound by, as  
17 beneficiaries, the documents under the trust. And Your Honor,  
18 I mentioned, for example, a case under U.S. law that dealt with  
19 23.1 and it was the Eighth Circuit case that I mentioned. And  
20 in that case you had beneficiaries of a trust. The fact that  
21 you are a beneficiary of the trust doesn't give you rights that  
22 are outside the trust documents. In fact, many trust documents  
23 have restrictions. These trust documents have specific  
24 provisions that deal with who can sue on the governing  
25 documents.

1                   Lastly, Your Honor, on the Perpetual matter.  
2                   Perpetual sued the trustee, which I think is very different and  
3                   I don't know the claims that were brought specifically but  
4                   Perpetual was also a hundred percent noteholder. Whatever  
5                   their theory was, presumably a hundred percent noteholder can  
6                   either direct the trustee or have a direction under the  
7                   documents and I haven't studied the Perpetual documents. But  
8                   the fact that you have a hundred percent of the notes is a very  
9                   different situation. And you have certain abilities to direct  
10                  under most no action clauses and the like and most trust  
11                  documents that you don't have if you're merely seven out of  
12                  30,000.

13                  So Your Honor, the last point I guess I would point  
14                  out is that whether you're in predefault or postdefault the  
15                  documents work the same way, which is that if you have a claim  
16                  Pacific would make a claim against LBSF on that chart, right,  
17                  you owe us money. Pacific would pay the trustee, right, which  
18                  pays the swap counterparty. The trustee, actually, is the one  
19                  that makes the payment. And then, if anything is left from the  
20                  payment to LBSF from the trustee, then it goes to the minibond  
21                  holders. And that is the same whether you're in predefault  
22                  mode or post -- I mean, that is just the way the documents  
23                  work. There is no change in the documents based on, at the  
24                  minibond level, based on a default.

25                  So with that, Your Honor, unless you have any

1       questions, I don't have anything further.

2           THE COURT: Mr. Sloane?

3           MR. SLOANE: Very quickly, Your Honor, just a couple  
4       of points. Perpetual -- Your Honor's right. Perpetual has  
5       nothing to do with this case. It's not this case. It has  
6       nothing to do with the issues here. The waterfall, at least  
7       insofar as the plaintiffs characterize it, really is not an  
8       issue here as it is in Perpetual, as it is in some of the other  
9       cases.

10          Mr. Davis said, why are we here and not the U.K.? We  
11       all know why we're here. We're here because the plaintiffs  
12       were looking for a place that accepts class actions and accepts  
13       contingent fees. And I say that because, as I said earlier, it  
14       is relevant to the question of gamesmanship. And gamesmanship  
15       is exactly what the forum non analysis looks to prevent.

16          Finally, Your Honor, I just wanted to point out that  
17       some smart lawyer did indeed make the filing of the proof of  
18       claim a contingent claim that includes a contingent claim in  
19       respect of this proceeding. Your Honor's absolutely right,  
20       that has absolutely nothing to do with this adversary  
21       proceeding, which they seek to prosecute. Indeed, if anything,  
22       it argues against the plaintiffs' position because their  
23       position is the trustee was asleep. Well, the trustee has  
24       pursued the remedies and the proper party that did file it was  
25       the proper HSBC Bank U.S.A. National Association not the

1 defendant in this case.

2 Thank you, Your Honor.

3 THE COURT: Okay. I'm going to take a ten minute  
4 break and think about whether or not I want to say anything  
5 now. And I'll come back in about ten minutes and I will say  
6 something, I'm not sure what it's going to be other than have a  
7 nice afternoon and I'll see you in ten. We're adjourned till  
8 then.

9 (Recess from 3:58 p.m. until 4:12 p.m.)

10 THE COURT: Be seated, please. I was looking at my  
11 calendar, what I think makes sense to do here is to add this to  
12 the adversary proceeding portion of the November 18th omnibus  
13 hearing agenda for purposes of a status conference, recognizing  
14 that I will either provide a bench ruling at that time or give  
15 you some indication as to where I am in the process of deciding  
16 this. And would suggest that you don't need three lawyers on  
17 one side, but I would suggest that those who feel that it's  
18 appropriate to be present show up and I'll tell you what I  
19 think at that time.

20 We're adjourned till then.

21 (Proceedings concluded at 4:13 p.m.)

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## C E R T I F I C A T I O N

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I, Pnina Eilberg, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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Pnina Eilberg

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AAERT Certified Electronic Transcriber (CET\*\*D-488)

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Veritext

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